

The Relationship Between Trespass and Fourth Amendment Protection After *Katz v. United States*

I. INTRODUCTION

The scope of the fourth amendment's protection against unreasonable searches and seizures has long been debated. Great importance is attached to the distinctions that determine whether a law enforcement officer's glance, sniff, or listening ear is characterized as a search. For if it is so characterized, fourth amendment protection is triggered and the officer's conduct must be authorized by a search warrant or it must fit within one of a few carefully defined exceptions to the warrant requirement.¹ To obtain a search warrant, an officer must prove to a magistrate the existence of probable cause, *i.e.*, sufficient facts to lead a reasonable man to believe that evidence or fruits of crime are located at the specific location named in the warrant.² As a general rule the scope of fourth amendment protection determines when probable cause and a warrant are prerequisites to an officer's intrusive actions and conversely when suspicious circumstances and wild hunches suffice to justify an officer's warrantless investigative intrusions. Thus, the boundaries of fourth amendment protection reflect our society's current balancing of the private citizen's rights of privacy and security against the interest of the government in detecting and preventing crime.³

This Comment will review the triggering mechanisms of fourth amendment protection, particularly as they relate to an officer's intrusions onto a private citizen's real property. The focus will be upon the "trespass" doctrine, *i.e.*, an officer's physical trespass⁴ onto a person's real property as a triggering device for fourth amendment protection. In particular this Comment will consider the continued vitality of the trespass doctrine after the decision in *Katz v. United States*,⁵ in which the Court stated that fourth amendment protection would be triggered whenever the government invaded a citizen's "reasonable expectation

1. *Katz v. United States*, 389 U.S. 347, 357 (1967). The generally recognized exceptions to the warrant requirement can be found in *Carroll v. United States*, 267 U.S. 132 (1925) (search of car stopped upon probable cause); *Warden v. Hayden*, 387 U.S. 294 (1967) (hot pursuit); *Frazier v. Cupp*, 394 U.S. 731 (1969) (consent); *Chimel v. California*, 395 U.S. 752 (1969) (search incident to arrest); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (objects in plain view); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (search of car for inventory purposes).

2. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

3. For a general discussion of the scope of fourth amendment protection, see Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974).

4. For the purposes of this paper, a trespass is any unauthorized entry upon or touching of the property of another. See W. PROSSER, *THE LAW OF TORTS* § 13 (4th ed. 1971).

5. 389 U.S. 347 (1967).

of privacy." Although *Katz* was decided more than ten years ago, it is still unclear whether the *Katz* rule merely supplements the trespass doctrine or whether it completely supplants it. This Comment will attempt to point out the limitations and weaknesses of the reasonable expectation of privacy test. Under the reasonable expectation of privacy test, it is easier for fourth amendment protection to be diminished by pervasive governmental propaganda and by the particular court's personal fourth amendment leanings. Additionally, the reasonable expectation of privacy test fails to trigger fourth amendment protection in the situation in which the defendant's right to be secure in his own home has been violated, but his right to privacy has not. The trespass doctrine sets rigid limits of fourth amendment protection and these limits are not susceptible to the weaknesses that plague the reasonable expectation of privacy test. For this reason this Comment will suggest that the trespass doctrine should be applied in conjunction with the *Katz* reasonable expectation of privacy test. In this way the trespass doctrine will set the minimum level of fourth amendment protection, while the *Katz* rule will expand protection to those situations in which a citizen's reasonable expectation of privacy has been violated without an officer's physical trespass.

II. U.S. SUPREME COURT'S USE OF TRESPASS AS A TRIGGERING DEVICE FOR FOURTH AMENDMENT PROTECTION

A. *The Trespass Doctrine*

In 1924, the Supreme Court found a revenue agent's trespass onto a defendant's property insufficient to trigger fourth amendment protection. In *Hester v. United States*,⁶ the agent had trespassed onto the defendant's land and had positioned himself in an open field 150 to 200 yards away from the defendant's home. From this position he watched the defendant hand a bottle of moonshine to a waiting customer. Rejecting the defendant's fourth amendment claim, Justice Holmes, speaking for the Court, concluded that regardless of a trespass, fourth amendment protection was "not extended to [events observable from] the open fields."⁷

Four years later in *Olmstead v. United States*,⁸ the Court set forth the trespass doctrine for fourth amendment protection. The doctrine was based on the concept that the fourth amendment protected "persons, houses, papers, and effects" when these entities were located within a "constitutionally protected area." A constitutionally protected area was a conclusory label used by the Court to connote areas to which fourth amendment protection was extended. The

6. 265 U.S. 57 (1924).

7. *Id.* at 59.

8. 277 U.S. 438 (1928).

Court found that fourth amendment protection could only be triggered when an officer made "an actual physical invasion of [the defendant's] house 'or curtilage'⁹ for the purpose of making a seizure."¹⁰

In *Olmstead*, the Court found that no fourth amendment protection existed when the law enforcement agents tapped the defendant's phone from the street without trespassing into the home or surrounding curtilage. Hence, lines had been drawn. A person's home, surrounding yard, and other buildings within the curtilage were constitutionally protected areas, while his open field was not. Thus, an officer could trespass onto one's property and make a search if the officer did not physically invade a constitutionally protected area.

Beginning with *Jones v. United States*¹¹ in 1960, the Supreme Court began to move away from basing its decisions on common law property concepts, and suggested instead that the protection of privacy was at the heart of the fourth amendment's proscriptions. The Court was troubled by the emergence of technological devices that allowed enforcement officers to gather unvolunteered information without a proscribable physical trespass.

The next year in *Silverman v. United States*,¹² the Supreme Court refused to sanction the warrantless use of an electronic listening device that had been pushed through the party wall of an adjoining house until it touched the heating ducts in the house occupied by the defendants. Although there was a trespass onto the defendant's property, the Court did not focus on the "ancient niceties of tort or real property law."¹³ Instead it found that "[a]t the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."¹⁴ In *Silverman* the government had invaded the privacy of the defendant's home, which in turn had brought its actions within the proscriptions of the fourth amendment.

B. *Katz v. United States and its Impact on the Trespass Doctrine*

1. *The Holding*

The stage had been set for *Katz v. United States*,¹⁵ the Supreme Court's seminal decision dealing with the scope of fourth amendment protection. In *Katz*, the Court held that the government's

9. The curtilage is a yard, courtyard or other piece of ground immediately surrounding a dwelling house. Often this area is enclosed by a fence.

10. 277 U.S. at 466.

11. 362 U.S. 257 (1960).

12. 365 U.S. 505 (1961).

13. *Id.* at 511.

14. *Id.*

15. 389 U.S. 349 (1967).

placement of an electronic listening device onto the exterior of a public phone booth violated the defendant's fourth amendment right to be free of unreasonable searches and seizures. Justice Stewart, writing for the majority in *Katz*, boldly stated that the fourth amendment protects "people—and not simply 'areas'—against unreasonable searches and seizures . . . [and] the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."¹⁶ The Court found that the government's activities in electronically eavesdropping on and recording the defendant's telephone conversations without first obtaining a warrant violated the privacy upon which the defendant justifiably relied. Justice Stewart's opinion stated that the trespass doctrine could no longer be regarded as controlling. Because the trespass doctrine was no longer the exclusive test, the Court overruled two earlier decisions that had placed wiretapping and electronic eavesdropping devices outside the proscription of the fourth amendment when these devices were installed without entering onto the defendant's property.¹⁷

Justice Harlan's concurring opinion in *Katz* set forth a two part triggering test for fourth amendment protection: "[F]irst . . . a person [must] have exhibited an actual (subjective) expectation of privacy and, second, . . . the expectation [must] be one that society is prepared to recognize as 'reasonable.'"¹⁸ Thus, Justice Harlan maintained that when the government invades a person's reasonable expectation of privacy, it must comply with the dictates of the fourth amendment.

2. *Clues From Katz Concerning the Vitality of the Trespass Doctrine*

The extent to which the *Katz* decision supplants the trespass doctrine remains unclear.¹⁹ This confusion results from the majority's refusal to articulate any fourth amendment triggering mechanism. Some lower federal courts have read *Katz* as expanding fourth amendment protection by merely supplementing the trespass doctrine.²⁰ On the other hand, some lower federal courts have focused upon Justice Harlan's concurring opinion and have read *Katz* as completely replacing the trespass doctrine with the reasonable expectation of privacy test.²¹ In determining which interpretation is correct, the analysis should focus upon the rights and interests protected by the

16. *Id.* at 353.

17. *Id.* The court overruled *Olmstead v. United States*, 277 U.S. 438 (1928) and *Goldman v. United States*, 316 U.S. 129 (1942).

18. 389 U.S. at 361 (Harlan, J., concurring).

19. Amsterdam, *supra* note 3, at 358.

20. See Sections III.B. and III.C. *infra*.

21. See Section III.A. *infra*.

fourth amendment as articulated by the *Katz* majority opinion. Once these rights and interests are identified, one can determine which interpretation is more apt to give protection to these rights and interests. That determination will provide substantial assistance in ascertaining the present status of the trespass doctrine.

Significantly the majority opinion in *Katz* declared that the fourth amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all."²² The Court's footnote in support of this statement is unclear:

The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth And a person can be just as much, if not more, irritated, and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.²³

The footnote seems to indicate that the fourth amendment also protects a citizen's sense of dignity and his right of personal security. The idea that the fourth amendment also protects one's right of personal security long antedated the decision in *Katz*. In the landmark decision of *Boyd v. United States*,²⁴ the Court stated that the fourth amendment protected an individual's "indefeasible right of personal security, personal liberty and private property."²⁵ And two years after *Katz* in *Davis v. Mississippi*²⁶ the Court reaffirmed that the fourth amendment protected a citizen's right of personal security.

Although the concepts of a right of privacy and a right of personal security overlap, they are not identical. A right of security refers to a right to feel safe and a right to be free of unsettling and disturbing intrusions by third parties. On the other hand, a right to privacy refers to a right to keep certain personal information and activities secret from third parties. Thus, situations do arise in which one's right of privacy has not been violated, but one's right of personal security has been violated.²⁷

From the foregoing analysis it seems evident that *Katz* should be read as recognizing that the fourth amendment protects both one's right of privacy and one's right of personal security. A triggering test that is based solely on one's reasonable expectation of privacy would be too restrictive a triggering mechanism. If the fourth amend-

22. 389 U.S. at 350.

23. *Id.* at 350 n.4. This footnote is a quote from the dissenting opinion of Justice Black in *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965).

24. 116 U.S. 616 (1886).

25. *Id.* at 630.

26. 394 U.S. 721 (1969). There, the Court said: "Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions." *Id.* at 727.

27. See *Alderman v. United States*, 394 U.S. 165 (1969).

ment also protects one's interest in personal security, a test that triggers fourth amendment rights when an officer physically trespasses onto the defendant's property would serve to protect that interest even when a privacy test failed to do so. Although the majority opinion does not explicitly authorize a trespass triggering mechanism, such a mechanism is not inconsistent with its rationale.

Justice Harlan's concurring opinion in *Katz*, on the other hand, suggests that the fourth amendment solely protects privacy interests. Significantly, lower federal courts have seized upon Justice Harlan's triggering device and have shied away from the inconclusive formulation in Justice Stewart's majority opinion. In particular one segment of Justice Harlan's opinion has been used to support the view that *Katz* overruled the trespass doctrine. Explaining the implications of the *Katz* rule in this segment, Justice Harlan wrote:

Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversation in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Cf. *Hester v. United States*.²⁸

Although Justice Harlan's opinion does not explicitly reject distinctions based on the trespass doctrine, it provides a foundation for that doctrine's circumvention. The just quoted section of Justice Harlan's opinion attempts to demonstrate that the Court's past decisions were really based on considerations of privacy, and thus that the fourth amendment analysis should focus solely upon these considerations. The controlling question under Justice Harlan's analysis becomes not whether a trespass has been committed, but whether the defendant's reasonable expectation of privacy has been frustrated. Thus, in situations involving a trespass but no violation of a reasonable expectation of privacy, some lower courts have used the Harlan passage to support their assertion that the reasonable expectation of privacy test must control and that there is no fourth amendment abridgment.²⁹

A footnote in the *Katz* majority opinion suggests that the majority recognized the problem of applying one formula to all fourth amendment problems. Justice Stewart noted that the Court's use of "constitutionally protected areas" as a device to explain the applicability of the fourth amendment "never suggested that this concept

28. 389 U.S. at 361 (Harlan, J., concurring). Justice Harlan's use of *Hester v. United States* strongly suggests that he believed that *Hester's* open field exception still maintained vitality after *Katz*. For a further discussion of this point see Section III.A.2. *infra*.

29. See, e.g., *United States v. Alewelt*, 532 F.2d 1165 (7th Cir. 1976), *cert. denied*, 97 S.Ct. 114 (1976); *United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

[could] serve as a talismanic solution to every Fourth Amendment problem."³⁰ But the Court's rejection of the constitutionally protected areas test as a talismanic solution does not necessarily repudiate its vitality in determining the scope of the fourth amendment.³¹ Rather, the Court merely recognized the inability of one test to meet all fourth amendment situations. This recognition militates against the argument that the *Katz* reasonable expectation of privacy test replaced all other fourth amendment triggering tests.³²

C. *United States Supreme Court Decisions Subsequent to Katz Concerning the Relationship Between a Trespass and Fourth Amendment Protection*

1. *The Court's Further Pronouncements on the "Plain View" Exception*

A year after the decision in *Katz*, the Supreme Court decided *Harris v. United States*,³³ a case dealing with the "plain view" exception to the warrant requirement. Prior to *Harris*, the Court had sanctioned a warrantless seizure of evidence when the police had a warrant to search a given area for specified objects and in the course of the search came across some other incriminating article that was in plain view.³⁴ The doctrine had also been applied when the police officer's initial intrusion was authorized by an exception to the warrant requirement and an incriminating article came within the plain view of the officer.³⁵ In *Harris*, the police officer's action did not fit within either of these categories.

In *Harris*, the defendant's car was lawfully in police custody. While performing his duty to protect the car, an officer opened the front door in order to lock it. The officer saw the registration card of the victim of a recent robbery on the metal stripping of the car. The Court held: "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."³⁶

This third category as exemplified by the holding in *Harris* has been difficult to define. Three years after the decision in *Harris*, the Court in *Coolidge v. New Hampshire*³⁷ attempted to mark out the

30. 389 U.S. at 351 n.9.

31. See Section II.C.3. *infra*.

32. "In short, the common formula for *Katz* fails to capture *Katz* at any one point because the *Katz* decision was written to resist captivation in any formula." Amsterdam, *supra* note 3, at 385.

33. 390 U.S. 234 (1968).

34. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 358 (1931).

35. *Warden v. Hayden*, 387 U.S. 294 (1967).

36. 390 U.S. at 236.

37. 403 U.S. 443 (1971).

boundaries of the plain view exception. In the course of the opinion the Court touched upon the *Harris* decision and appeared to set forth two elements for the *Harris* exception. First, the officer's initial intrusion must be authorized "by some other legitimate reason for being present unconnected with a search directed against the accused."³⁸ Second, the officer must "inadvertently come across an incriminating object."³⁹ Under these circumstances the evidence may be seized without a warrant.

Both elements are problematic. The plain view exception can cut into the trespass doctrine whenever the court finds that an officer's trespass was based on "some other legitimate reason for being present unconnected with a search directed against the accused." The court, however, made no effort to define what a qualifying "legitimate reason" would be. Thus, the limits of what may be a legitimate reason for being present are bounded only by the imagination of the courts. For example, it is most probable that an officer's trespass to make a general inquiry would constitute a legitimate reason.⁴⁰ Because the legitimate reasons have not been defined, however, some lower federal courts have upheld warrantless seizures of evidence upon plain view grounds when the police officer trespassed onto the defendant's property and the officer's activities went beyond a general inquiry.⁴¹

Second, the Court's opinion does not define the degree of uncertainty required to make a discovery of incriminating evidence by the police inadvertent.⁴² It is thus unclear whether the discovery of incriminating evidence must be completely unexpected or whether that discovery can be suspected.⁴³ Additionally, the *Coolidge* decision did not state whether the inadvertence requirement is applicable when an officer, standing outside of a constitutionally protected area, makes an incriminating discovery while peering into a constitutionally protected area and trespasses onto the property to make a seizure.⁴⁴ Thus,

38. *Id.* at 466.

39. *Id.*

40. See e.g., *United States v. Knight*, 451 F.2d 275 (5th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

41. See e.g., *Nordskog v. Wainwright*, 546 F.2d 69 (5th Cir. 1977). In that case the police officer knocked on defendant's door to make a general inquiry. When the defendant did not answer, the policeman peered into a window and saw incriminating evidence. Later the defendant came to the door and invited the officers into the house where the officers once again spotted the incriminating evidence. The court held that the plain view exception authorized the warrantless seizure of this evidence.

42. *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 237, 244 (1972).

43. One interpretation suggests that a plain view sighting is not inadvertent when the police had probable cause to obtain a search warrant. *Id.* at 244-45. This view has found support in some lower federal court decisions. E.g., *United States v. Artieri*, 491 F.2d 440, 442 (2d Cir. 1974).

44. The relevance of the inadvertence requirement in this situation requires an assumption that the concept of constitutionally protected areas maintains vitality in fourth amendment analysis. See Section II. C.3 *infra* for a discussion of this point.

if the Supreme Court is to firmly reassert the vitality of the trespass doctrine, it must also clarify the relationship between the trespass doctrine and the plain view exception.⁴⁵

2. *The United States Supreme Court Reasserts that the Fourth Amendment Protects the Security of the Home—*
Alderman v. United States

In the 1969 decision of *Alderman v. United States*⁴⁶ the Supreme Court was confronted with a unique situation in which the defendant's personal right of privacy had not been violated, but his right to be secure in his personally-owned business premise had been violated. In *Alderman* the Government placed the business premises of one of the defendants, Alderisio, under electronic surveillance. Apparently the conversations of the two other codefendants, Alderman and Kolod, were unlawfully overheard at that location. The conversations implicated Alderisio in the crime of conspiring to transmit murderous threats in interstate commerce. One of the issues was whether Alderisio had standing to object to the use against him of information obtained from illegal surveillance of his business premises, when he was neither present at the premises nor a party to the overheard conversations.

The Court held that a property owner had standing to suppress conversations that had occurred on his premises and had been overheard by government officials by the use of electronic eavesdropping equipment, even when the property owner was not present and did not participate in the conversation. The Court also held that codefendants and coconspirators had no standing against the admission against them of information that had been obtained through electronic surveillance unless the codefendant or coconspirator owned the premises where the surveillance took place or was present when the surveillance occurred.⁴⁷ *Alderman* adds two further points to this discussion of the trespass

45. For a further discussion of the problems connected with the Supreme Court's articulation of the plain view exception see Comment, *Constitutional Standards for Applying the Plain View Doctrine*, 6 ST. MARY'S L.J. 725 (1974); Note, "Plain View"—Anything But Plain: Coolidge Divides the Lower Courts, 7 LOY. L.A.L. REV. 489 (1974).

46. 394 U.S. 165 (1969).

47. *Id.* at 171-72. See *Jones v. United States*, 362 U.S. 257, 261 (1960), in which the Court said:

In order to qualify as "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

...

Ordinarily then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy.

See generally Trager and Lobenfeld, *Law of Standing under the Fourth Amendment*, 41 BROOKLYN L. REV. 421 (1975).

doctrine. First, the personal security of the home maintained vitality as a decisional factor in fourth amendment standing questions.⁴⁸ Second, Justice Harlan's understanding of *Katz* was not shared by the majority of the *Alderman* court.

Justice White's majority opinion based the property owner's standing to suppress on the right of an owner to be secure in his own home: "We do not deprecate Fourth Amendment rights. The security of a person and property remains a fundamental value which law enforcement officers must respect."⁴⁹ Turning to the words of the fourth amendment, Justice White found that the amendment expressly protected the home⁵⁰ from unreasonable searches and seizures. Although he did not invoke the trespass doctrine—it would have been inapplicable because the surveillance occurred without a trespass—he reasserted that the owner of a home would be protected from intrusions into it even when the owner was not present at the home and when those intrusions did not invade his own personal expectation of privacy. The majority concluded that *Katz*, by holding the fourth amendment protects persons in their private conversations, "was [not] intended to withdraw any of the protection which the Amendment extends to the home"⁵¹

Justice Harlan concurred in part and dissented in part. He agreed with the majority that "if the police see a person's tangible property while committing their trespass, they may not constitutionally use this knowledge either to obtain a search warrant or to gain a conviction."⁵² He dissented, however, from the Court's decision to grant standing to the owner of the premises when the owner did not participate in the particular conversation in any way. Justice Harlan stated:

[W]e should reject traditional property concepts entirely, and reinterpret standing law in the light of the substantive principles developed in *Katz*. Standing should be granted to every person who participates in a conversation he legitimately expects will remain private—for it is such persons that *Katz* protects. . . . For granting property owners standing does not permit them to vindicate intrusions upon their *own* privacy

. . . His *privacy* is not at all disturbed by the fact that other people in other places cannot speak without the fear of being overheard.⁵³

48. It must be noted that the *Alderman* decision addressed only the issue of standing and did not decide the defendant's claims on their merits. The decision nevertheless adds to our understanding of the *Katz* rationale.

49. 394 U.S. at 175.

50. Although the government's intrusive action in *Alderman* occurred in the defendant's business establishment, the court continually referred to the security of the home. Apparently the Court felt that the added constitutional protection given to the home also applied to a citizen's privately-owned business establishment.

51. 394 U.S. at 180.

52. *Id.* at 195 (Harlan, J., concurring and dissenting).

53. *Id.* at 191-93 (emphasis in original).

The majority opinion in *Alderman* and Harlan's concurring and dissenting opinion can be explained by their differing views of the *Katz* holding. To Harlan, *Katz* stood for the proposition that the fourth amendment solely protects a person's privacy interests. The majority, on the other hand, did not limit *Katz* in that way. The *Alderman* majority felt that while the fourth amendment *primarily* protects privacy, it also protects other interests, including the security of the home.⁵⁴ From *Alderman* it can be inferred that to the extent that property concepts allow the owner to vindicate the security of his own home, they retain vitality for triggering fourth amendment protection.⁵⁵

3. *United States Supreme Court's Use of the Concept of Constitutionally Protected Areas After Katz v. United States*

Although Justice Stewart's majority opinion in *Katz* stated that the fourth amendment protects "people and not simply areas," the Court since *Katz* has nonetheless occasionally used the concept of constitutionally protected areas to analyze fourth amendment problems.

In the 1972 decision of *Air Pollution Variance Board v. Western Alfalfa Corp.*⁵⁶ the Supreme Court relied on the pre-*Katz* distinction between a search conducted from an open field and one conducted from within the curtilage or premises, and found no fourth amendment protection existed when the intrusion was only upon the complainant's open field. In *Air Pollution*, an inspector for the Colorado Department of Health entered upon the defendants' outdoor premises in order to take an opacity test for the smoke being emitted from the defendants' chimneys. The defendants claimed that this warrantless action was an unreasonable search violative of the fourth amendment. Justice Douglas, writing for the majority, noted that the inspector was on the defendant's property. However, "[h]e had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke. The Court in *Hester v. United States*, . . . speaking through Mr. Justice Holmes, refused to extend the Fourth Amendment to sights seen in 'the open fields.'"⁵⁷ The majority's use of the open fields exception indicates that constitutionally protected areas are still useful to the Court's fourth amendment analysis.

54. One commentator argues that Justice Harlan's position is the most consistent with the *Katz* holding. Note, *Reasonable Expectation of Privacy—Katz v. United States—A Postscript*, 9 IND. L. REV. 468 (1976).

55. "So far as I can tell, the Supreme Court has not applied *Katz* to refuse fourth amendment protection in any case in which protection would have been afforded under pre-*Katz* standards." Amsterdam, *supra* note 3, at 460 n.349.

56. 416 U.S. 861 (1974).

57. *Id.* at 865.

As recently as 1976 the Court in *United States v. Miller*⁵⁸ apparently reaffirmed the validity of the concept of constitutionally protected areas. In rejecting the argument that bank records obtained by an invalid subpoena were to be suppressed, the Court found *both* that there was no intrusion into any area in which the respondent had a protected fourth amendment interest and that the respondent had no legitimate expectation of privacy for bank records.⁵⁹ It seems therefore that the Court is not yet willing to rely upon the reasonable expectation of privacy test as the sole test of fourth amendment protection.

III. THE LOWER FEDERAL COURTS' TREATMENT OF THE RELATIONSHIP BETWEEN TRESPASS AND FOURTH AMENDMENT PROTECTION AFTER *Katz v. United States*

The preceding discussion has shown that the Supreme Court has not expressly defined the relationship between the trespass doctrine and the reasonable expectation of privacy test. This section will investigate how the lower federal courts have viewed the vitality of the trespass doctrine after *Katz*.

A. *The Trespass Doctrine—Its Complete Replacement After Katz by Harlan's Reasonable Expectation of Privacy Test*

1. *The Seventh Circuit's Technical Trespass Doctrine*

The Seventh Circuit has completely replaced the trespass doctrine with Justice Harlan's reasonable expectation of privacy test. In so doing, it has withdrawn fourth amendment protection from areas that would have been protected before the decision in *Katz*. In particular, when the Seventh Circuit has found that the defendant's reasonable expectation of privacy was not violated, it has dismissed an officer's trespass into a constitutionally protected area as being merely a "technical trespass" and not dispositive of fourth amendment protection.

The Seventh Circuit first introduced the concept of a "technical trespass" in *United States v. Hanahan*.⁶⁰ In *Hanahan* the Seventh Circuit found inconsequential an officer's trespass onto the curtilage surrounding the defendant's garage. The defendant sought to suppress the evidence obtained when the police officer peeked into an uncovered

58. 425 U.S. 435 (1976).

59. *Id.* at 440-43. See *United States v. Ford*, 553 F.2d 146 (D.C. Cir. 1977), in which the court referred to this apparent two-step analysis: "This analysis can only be read to reflect a refutation of the Government's argument that trespasses are irrelevant to Fourth Amendment analysis when ancillary to electronic surveillance. The Amendment protects people by protecting certain expectations of privacy which relate to private physical areas as well as conversations." *Id.* at 157 n.43.

60. 442 F.2d 649 (7th Cir. 1971).

window to view the interior of a garage leased by the defendant. The officer had spotted a particular automobile that matched the description of an automobile that had been used in a recent robbery. The prosecution claimed that the officer was standing on a private sidewalk commonly used by patrons of a nearby pizzeria when he looked into the garage, while the defendant claimed that the officer was standing on the curtilage, which consisted of a few inches of grass between the sidewalk and the garage.

The court began its analysis by asking whether the officer had a right to be in the position to peek into the garage window, citing *Harris v. United States*. The use of *Harris* is problematic, because the officer in *Hanahan* entered onto the defendant's property expressly to search for evidence against the defendant.⁶¹ Thus, the officer's initial intrusion was not the result of some legitimate reason for being present unconnected with a search directed against the accused.⁶² Nevertheless, the court reasoned that if the officer's position did not frustrate the defendant's reasonable expectation of privacy, the officer had a right to be in that position. Focusing on the first part of Justice Harlan's two part test, the court apparently found that the defendant did not subjectively intend to keep the garage and its contents private. The court reasoned that although the defendant kept the garage locked, a few of his friends and his landlord had access to it. Additionally the defendant had not boarded up two of the three garage windows, and the only window that was covered had been covered by a previous lessee.

The court held that the officer was standing on the frequently used private sidewalk when he made his view, but accepted for the purposes of argument that the officer had stepped onto the curtilage. The court declared that even if the officer had stepped onto the "few inches of grass between the sidewalk and the garage itself," . . . it was no more than a technical trespass on the part of the officer."⁶³

The opinion did not define the term "technical trespass." Reasoning from the facts in *Hanahan*, the phrase is susceptible to three meanings. First, a trespass may be technical if the officer has moved only a short distance from a place in which he has a right to be.⁶⁴ Second, a trespass may be technical if the defendant fails to take precautions to make the premises private.⁶⁵ Third, if the officer could

61. See Section II.C.1. *supra*.

62. It is also questionable whether the police officer's plain view in *Hanahan* was inadvertent. See notes 42-44 *supra* and accompanying text.

63. 442 F.2d at 654.

64. This was the interpretation the phrase was given in *United States v. Johnson*, No. 73-2221 (D.C. Cir. *en banc* January 12, 1977), in which the majority opinion lifted the phrase "technical trespass" from the Seventh Circuit opinions.

65. In two recent state court decisions involving the plain view exception, the courts have apparently based their holding on this same belief that the defendants must take affirmative action to secrete evidence from the plain view of officers in order to preserve their fourth amend-

have seen the incriminating evidence equally well from a place where he had a right to make a view, the trespass is technical.⁶⁶

In 1973, two years after the decision in *Hanahan*, the Seventh Circuit in *United States v. Connor*⁶⁷ once again relied on the technical trespass doctrine. In *Connor* the officer stood on the grass between the garage and an alley and viewed activities inside the garage through an opened overhanging door. The activities inside the well-lighted garage could be seen from either the alley or the curtilage. Stating its rationale tersely, the court upheld the officer's warrantless search from the curtilage:

[T]he interior of the garage was clearly visible through the open overhead door from outside the building. . . . Under these circumstances, the defendants had no reasonable expectation of privacy. Even if the officers were on the apron, which was not fenced off from the alley, we think that a mere "technical trespass" did not transform an otherwise reasonable investigation into an unreasonable search.⁶⁸

The court's use of the phrase "technical trespass" was again capable of the three interpretations mentioned earlier, but two of the interpretations seem more probable upon a review of the fact situation and the opinion. It appears that if the officer could just as easily view the evidence from the alley, a place where he had a right to be, any trespass on the property to make that same view would be a technical trespass. The court also hinted that a technical trespass occurs when the officer steps into an area that the defendants did not take affirmative steps to make private, because the court suggested that the defendants could have put a fence around the curtilage if they wanted it to remain private.

The Seventh Circuit's use of the phrase "technical trespass" was somewhat clarified in *United States v. Alewelt*.⁶⁹ The defendant left his coat on a coat rack in his mother's office at the Illinois Department of Public Health. In the jacket pocket and apparently clearly visible were a white cloth cap and several bundles of money in wrappers. It appears that at first the officers did not see the coat from the public hallway, but discovered the incriminating evidence when they were in the office looking through the mother's waste paper can after hours.

ment rights. *George v. Texas*, 509 S.W.2d 347 (Tex. Crim. App. 1974) (officer's search conducted by looking through knot holes in a fence came within the plain view exception); *California v. Hill*, 31 Cal. App. 3d 1005, 107 Cal. Rptr. 791 (1973) (officers standing on the defendant's front porch had a right to observe whatever could be seen through a front window, provided that they did not make or enlarge the opening through which they looked). These two cases indicate that this rule is susceptible to substantial abuse.

66. In other words, under the third interpretation if the officer could have seen the incriminating object from a position to which the plain view exception applied, the trespass was technical.

67. 478 F.2d 1320 (7th Cir. 1973).

68. *Id.* at 1323.

69. 532 F.2d 1165 (7th Cir.), *cert. denied*, 97 S. Ct. 114 (1976).

They had entered the office with the consent of a janitor and once they saw the coat, they seized it along with the incriminating items.

The court began its analysis by quoting from *Katz*: "Whatever a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."⁷⁰ The court reasoned that the coat rack was so placed that a person in the public hall could see through the open doorway without actually entering the room and concluded: "The agents' limited intrusion into the office with the janitor's consent, while it may have been a technical trespass against the State of Illinois, did not violate any interest of defendant that was subject to the protection of the Fourth Amendment."⁷¹

Once again the three interpretations of the technical trespass doctrine were possible upon the facts of the case. The court emphasized, however, that the officer could have viewed the evidence from the hallway, which was a place where he had a right to be.⁷² If this was the key fact, then *Alewelt* reveals that a trespass is technical when the officer *could* have viewed the evidence from a location in which he was not a trespasser.

Connors and *Hanahan* had intimated that the inadvertence of the officer's trespass was relevant, but *Alewelt* indicated that a trespass is still technical when the officer intentionally enters onto the property of another, since in *Alewelt* the officers intentionally entered the private office of the defendant's mother.⁷³ In any event, in *Hanahan*, *Connor*, and *Alewelt* the Seventh Circuit has established that if the defendant's reasonable expectation of privacy is not invaded, the officer's intrusion onto his property is a mere technical trespass and the ensuing search is not violative of the fourth amendment. Thus, it is fair to say that the trespass doctrine has met its demise in the Seventh Circuit, and the reasonable expectation of privacy test is alone controlling.

2. *The Effect of Reasonable Expectation of Privacy as the Exclusive Test Upon the Open Fields Exception to the Trespass Doctrine*

When one's reasonable expectation of privacy is the controlling test and distinctions between house, curtilage, and open fields disappear, the effect is to overrule *Hester v. United States*.⁷⁴ In the district

70. *Id.* at 1168 (quoting *Katz*, 389 U.S. at 351).

71. 532 F.2d at 1168.

72. See *United States v. Case*, 435 F.2d 766, 768 (7th Cir. 1970), in which the court said that a place where the officer has a right to be is synonymous with a place where the public is entitled to be.

73. *Accord*, *United States v. Morrow*, 541 F.2d 1229 (7th Cir. 1976), *cert. denied*, 97 S. Ct. 1556 (1977), in which the officer saw a stolen car in a garage from the sidewalk of defendant's home after making a general inquiry at the front door. The officer's trespass to reach the garage and peer into it was intentional, but was still labeled as technical.

74. 265 U.S. 57 (1924).

court decision of *Gedko v. Heer*⁷⁵ the *Hester* open fields exception was found uncontrolling for this precise reason. In *Heer*, the officers hid themselves at the edge of the timberline on the defendant's property, 300 to 400 feet from the defendant's farm buildings. From this vantage point in the open fields, the officers overheard the defendant's incriminating statements to his wife and watched him attempt to hide his home-grown marijuana crop when a government plane flew over his property at a very low altitude.

The prosecution based its arguments on *Hester v. United States*, stating that fourth amendment protection did not extend to the open fields. The *Katz* opinion, they argued, abolished trespass as the controlling element in determining fourth amendment protection in constitutionally protected areas. They maintained that *Katz* did not address governmental intrusion in the open fields because the open fields had never been a constitutionally protected area. The prosecution bolstered its argument by citing the post-*Katz* decision of *Air Pollution Variance Board v. Western Alfalfa Corp.*⁷⁶ The prosecution noted that in *Air Pollution* the Supreme Court held on the authority of *Hester* that a state air pollution inspector could enter the defendant's open fields to make a smoke test. Thus, the prosecution argued that *Hester* was still very much alive.

The court rejected the prosecution's *Hester* argument and found that the defendant's reasonable expectation of privacy had been violated. The court first distinguished *Hester*. In the court's view the effect of *Katz* was to make the area in which the intrusion took place one of the several factors to be considered when the court evaluated the reasonableness of the defendant's expectation of privacy. In the court's opinion *Hester* retained little independent meaning, being limited to the proposition that open fields were not areas in which one traditionally could have expected privacy. While a court might view more skeptically an assertion that one expected privacy for events observable from an open field, the final determination of the privacy issue required a close examination of all the facts. The court also dismissed the theory that *Air Pollution* controlled the continued vitality of the open fields exception. The court reasoned that in *Air Pollution*, the defendant could have no reasonable expectation of privacy concerning his smokestack emissions because they were plainly visible to anyone in the city who was near the plant. Hence, the court concluded that any reference to *Hester* in Justice Douglas' majority opinion in *Air Pollution* was unnecessary to the holding.

The court then took Justice Harlan's test to its logical conclusion by striking the death blow for *Hester* in the context of this particular

75. 406 F. Supp. 609 (W.D. Wis. 1975).

76. 416 U.S. 861 (1974).

fact situation. The court looked at all of the facts to determine first whether the defendant had a subjective expectation of privacy in this situation and, second, whether society was prepared to recognize that expectation as reasonable. The court answered both questions affirmatively. It found that the defendant's 160 acre farm was woody and hilly and located in a rural section of Wisconsin, that the petitioner's property was fenced, and that the law enforcement officers without consent entered onto his property by climbing over a fence. The nearest public road was six tenths of a mile from the farm yard and a "No Trespassing" sign was posted on the property at the gate where the lane intersected with the highway. The court concluded that the petitioner had a reasonable, exhibited and justifiable expectation of privacy concerning his activities and conversations not observable or audible beyond the boundaries of his own property. Thus, the defendant's fourth amendment protection extended to the open fields of his property.⁷⁷

3. *An Analysis of the Exclusive Use of the Reasonable Expectation of Privacy Test for Fourth Amendment Problems*

Justice Harlan's capsulization of the *Katz* holding is susceptible to three major criticisms. The first prong of Justice Harlan's triggering mechanism asks whether the defendant actually had an expectation of privacy that was frustrated by the government's intrusive actions. Unfortunately, the government can manipulate that subjective expectation by the forms of surveillance it commonly employs and the types of police tactics it generally uses. For example, one writer, expressing his concern over the pliability of a rule based on subjective expectations, states: "If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance."⁷⁸ Even Justice Harlan appeared to have similar thoughts about his *Katz* formulation. Dissenting in *United States v. White*,⁷⁹ he wrote: "The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules, the customs and values of the past and present."⁸⁰

The second part of Justice Harlan's test asks the court to determine whether society is willing to recognize the defendant's expecta-

77. *But see* *United States v. Brown*, 487 F.2d 208 (4th Cir. 1973), *cert. denied*, 416 U.S. 909 (1974); *Patler v. Slayton*, 353 F. Supp. 376 (E.D. Va. 1973).

78. *Amsterdam*, *supra* note 3, at 384.

79. 401 U.S. 745 (1971).

80. *Id.* at 786 (Harlan, J., dissenting).

tion of privacy as reasonable. This aspect of the test is almost an open invitation to the judge to allow his personal fourth amendment philosophy and conceptual notion of societal values to play an important role in determining the defendant's fourth amendment rights. This factor also allows the court to manipulate its analysis to reach the result it feels is just in a particular situation. Although the latter criticism can be levied against any test that uses a reasonableness standard, the problem is much more acute in the area of fourth amendment objections to evidence. Often the seized evidence is the heart of the prosecution's case and without it, the prosecution would be unable to secure a conviction. Additionally, once admitted, illegally seized evidence does not distort the accuracy of the fact-finding process.⁸¹ In fact, it is often highly probative of guilt. The court must fight the temptation to find the search and seizure constitutional, especially when the seized evidence overwhelmingly indicates the defendant's guilt. Thus, the second part of Harlan's test supplies the court with a fudge factor that can dictate the outcome of the fourth amendment challenge.

The Ninth Circuit's decision in *United States v. Fisch*⁸² is an example of the test's susceptibility to abuse. At issue was the admissibility of the defendant's conversations in his motel room that were overheard by government agents. The agents testified that occasionally they could overhear the defendant's conversations in their adjoining room but the bulk of the statements were overheard when an officer crouched in the hallway outside the defendant's motel room. By placing his ear near the crack of the door, the agent was able to overhear and transcribe much of the defendant's conversations. The court first found that the defendants did not demonstrate a subjective expectation of privacy. It also found that society was not prepared to recognize as reasonable the defendant's expectation that no police officer would be listening to their conversations in a crouched position six inches away from their motel room door. The court noted the nontrespassing technique used for obtaining the information, the absence of artificial means of probing, and the gravity of the offense (the smuggling of marijuana). The importance of the latter two factors is indeed questionable. Thus, the case serves as an example of how the Harlan triggering mechanism can be molded to the judge's particular proclivities.

Finally, Justice Harlan's formulation does not take into account that other interests besides privacy are protected by the fourth amendment. Justice Harlan's test would not protect a defendant in a situation similar to *Alderman v. United States*⁸³ where the defendant's

81. See *Stone v. Powell*, 428 U.S. 465 (1976).

82. 474 F.2d 1071 (9th Cir.), cert. denied, 412 U.S. 921 (1973).

83. 394 U.S. 165 (1969). For a discussion of *Alderman*, see section II.C.2. *supra*.

personal privacy was not violated, but his right to be secure in his own home was infringed.

B. *The Trespass Doctrine—Its Vitality After Katz in Constitutionally Protected Areas Based on the Right of Security in One's Own Home*

1. *The Continued Vitality of the Trespass Doctrine in the Fifth Circuit*

An officer's trespass into the home or its curtilage continues to trigger fourth amendment protection under a view adopted by the Fifth Circuit. Underlying this rule is the belief that the fourth amendment protects the sanctity of the home and the right of the individual to be left alone in his own home. Thus, the trespass doctrine is a convenient way of preserving those interests.

The rule originated in a 1955 pre-*Katz* decision, *Brock v. United States*.⁸⁴ Revenue agents had observed the operations of a still for several days and had arrested three men at the still. Believing that there was additional evidence at a house a quarter of a mile away, the officers entered onto the curtilage of the home and peered into the windows. The court in suppressing the evidence obtained by this illegal search said: "Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his 'right to be left alone' as guaranteed by the Fourth Amendment."⁸⁵

In *United States v. Davis*,⁸⁶ a 1970 post-*Katz* decision, the principles of *Brock* were reaffirmed. In *Davis*, law enforcement officers returned to the defendant's premises at about 10:30 p.m. to search for a gun that had been discarded by the defendant in a melee that had occurred on the premises earlier that afternoon. The government claimed that a search warrant was not required because the gun was in plain view. The court noted that the plain view rule only applied when the officer had a right to be in the position to have that view. Because the officer had had to trespass into a constitutionally protected area in order to secure that view, the court quickly dismissed the government's argument.

The court did not consider *Katz* in determining the scope of fourth amendment protection. It stated: "The high degree of judicial sanctity which the courts have accorded to dwellings is based upon the concept of privacy and the right to be left alone. The security of homes should not be left to the sole discretion of police officers."⁸⁷ Implicit

84. 223 F.2d 681 (5th Cir. 1955).

85. *Id.* at 685.

86. 423 F.2d 974 (5th Cir. 1970), *cert. denied*, 400 U.S. 836 (1970).

87. *Id.* at 977.

in the court's rationale is the belief that the fourth amendment protects both the security of the home and the individual's right of privacy.⁸⁸ The trespass doctrine was used by the court because it gave the home extra protection from governmental intrusion.⁸⁹

Consistent with this rationale is the Fifth Circuit's refusal to utilize the trespass doctrine when the additional justification of protection of the home is absent. The Fifth Circuit has held that a warrantless search of a car in order to find its Public Vehicle Identification Number does not fall within the proscription of the fourth amendment even though it involves a technical trespass. In *United States v. Polk*⁹⁰ the court noted that the car was unlocked, that the officer did not do damage to the car in making the inspection, that the search did not extend to the private area of the automobile, and that there was no seizure of the car. The court also stated that the officer had not trespassed onto the defendant's real property, noting that the car was located in a repair garage, the owner of which gave the officer permission to check the car.

In this situation the court concluded that the only interest that possibly could have been invaded was the owner's interest in privacy. The court refused to apply the trespass doctrine and found that an automobile owner did not have a reasonable expectation of privacy concerning the car's vehicle identification number.⁹¹ Thus, the court implicitly recognized that the trespass doctrine is a doctrine that gives protection beyond privacy to those constitutionally protected areas that are covered by additional rationales.

2. *Problems with the Fifth Circuit Approach*

The word trespass indiscriminately applies to all acts by officers when they enter onto a defendant's premises without his consent, regardless of the intention of the officer. The Fifth Circuit has recognized the overinclusiveness of a pure trespass doctrine, and has found that a fourth amendment search does not occur when an officer merely enters the property to make a general inquiry.

In *United States v. Knight*⁹² the police received a tip from a reliable informant that stolen property would be unloaded in the 2900 block of Klondike in Dallas, Texas. A pickup truck with a trailer was

88. For a discussion of the difference between a right of privacy and a right of security, see the text accompanying notes 24-27 *supra*.

89. See *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974), in which the Fifth Circuit applied the trespass doctrine rationale to a common fenced-in backyard serving an apartment complex shared by four households. The opinion was based upon the sanctity of the home and the right to be left alone.

90. 433 F.2d 644 (5th Cir. 1970).

91. *Id.* at 647-48.

92. 451 F.2d 275 (5th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

spotted being unloaded at 2918 Klondike a few hours later. The officers got out of their patrol car in order to ask the men unloading the truck a few questions. On their way to the garage, the officers spotted the labelling on the cartons piled outside of the truck and recognized the cartons as stolen goods. Simultaneously, as the men saw the police approaching, all but one ran from the scene. The officers questioned the man who remained on the scene. The court upheld the search and seizure because the evidence was spotted inadvertently when the officers entered onto the property to make a general inquiry.

The line between a search and a general inquiry is difficult to draw. It appears that the subjective intent of the police officer controls the distinction. If in making a general inquiry the officer approaches the house and knocks on the front door⁹³ or approaches human activity in the yard, then the officer has a right to be in that position. If any evidence falls within his plain view while in that position, it is seizable without a warrant. If, on the other hand, the officer enters the property looking solely for evidence of crime, then the officer's presence constitutes a search within the proscription of the fourth amendment.⁹⁴

The general inquiry rule is susceptible to abuse. An officer may enter onto the premises with the intent to look for incriminating evidence; however, if he masks his trespass in the clothing of a general inquiry, it will be permissible. Nevertheless, the trespass doctrine still has much bite to it. Because the officer's subjective intent will be analyzed from his objective acts, the doctrine will still curb the unrestrained curiosities of an officer who surreptitiously skulks around the defendant's yard searching for evidence.

C. *Trespass—As a Per Se Invasion of One's Reasonable Expectation of Privacy*

Some courts have recognized that property values lie at the center of one's right of privacy.⁹⁵ The two are so intertwined that the invasion of one's property rights by a trespass also violates one's privacy rights. This relationship has led some courts to come very close to adopting a per se rule that an officer's trespass always invades a reasonable expectation of privacy.

The strongest formulation of the rule is found in Chief Judge Bazelon's dissenting opinion in *United States v. Johnson*.⁹⁶ In *John-*

93. See *Foster v. United States*, 296 F.2d 65 (5th Cir. 1962).

94. See *United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975), *affirmed en banc*, 537 F.2d 227 (5th Cir. 1976).

95. See, e.g., *United States v. Carriger*, 541 F.2d 545, 549 (6th Cir. 1976); *United States v. Hunt*, 505 F.2d 931, 937 (5th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975).

96. No. 73-2221 (D.C. Cir. *en banc* Jan. 12, 1977). By court rule, the decision does not have precedential value. 547 F.2d 706-07 (1977).

son, the police received an anonymous phone tip that a narcotics violation could be seen by looking through the right front window of a particular urban dwelling. Two officers responded to the tip, walked up the private sidewalk toward the front door, and saw light coming from the right front basement window. One officer took two or three steps off the sidewalk, peered into the basement window for ten seconds, and saw the defendants "cutting"⁹⁷ heroin. The prosecution argued that the warrantless search and seizure was justified because it fell within the plain view exception. The majority found that the police acted reasonably in this circumstance and overlooked the intrusion onto the yard, labelling it a technical trespass that was minimal in distance. A concurring opinion focused on the location of the defendants' activities and found that the defendants' actions, which could be seen from the private sidewalk, were exposed to the public, and the officer's trespass did not invade the defendants' reasonable expectation of privacy.⁹⁸

Chief Judge Bazelon in his dissent noted that at one time the fourth amendment protected only against a physical trespass, but that *Katz v. United States* expanded the protection of that amendment, holding that people and not places came within its ambit. Taking aim at the affirming judges' use of *Katz v. United States* to deny the defendants' claims, Chief Judge Bazelon said:

[T]he majority today in effect states that a person does not always have a reasonable expectation that he will not be spied upon by a trespassing police officer, thereby converting an expansion of the Fourth Amendment into a contraction. Contrary to the majority, I think it is reasonable for a person to expect his activities to be safe from the eye of a person who must trespass to view him. In light of the narrowness of the warrant exceptions I doubt the government would ever be able to justify a search on plain view grounds when it was necessary for the officer to trespass in order to achieve the view.⁹⁹

Chief Judge Bazelon came tantalizingly close to saying that a trespass is a per se invasion of one's reasonable expectation of privacy, but he refrained from expressly stating it. Chief Judge Bazelon did make clear, however, that the government must sustain the burden of proving that the defendant's reasonable expectation of privacy has not been violated, and noted that the government could only justify the warrantless search when it also sustained the burden of establishing the applicability of an exception to the warrant requirement. In short, the police officer's trespass, unaided by an exception, established a very strong presumption that the defendant's reasonable expecta-

97. Cutting heroin refers to the process of dividing the bulk of heroin and preparing the narcotics for distribution.

98. No. 73-2221 (D.C. Cir. *en banc* Jan. 12, 1977) (Leventhal, J., concurring).

99. *Id.* slip op. at 12-13 (Bazelon, C.J., dissenting).

tion of privacy had been invaded. Because Chief Judge Bazelon's theory is only roughed out on the last few pages of his dissent, it is impossible to predict whether he would apply this fourth amendment theory outside the setting of the home.

Closely akin to Chief Judge Bazelon's view is the position of the Sixth Circuit in *United States v. Carriger*.¹⁰⁰ In *Carriger*, narcotics officers trailed one Beasley, in an attempt to find the source of his heroin supply. Officers followed Beasley to an apartment house in which the front and back entrance doors could only be opened by a key or by someone inside activating a buzzer system. One officer waited for some workmen to leave the building and slipped into the building before the door closed. Beasley spotted the agent and walked quickly to the defendant's apartment where he apparently returned a green shopping bag to the defendant. The agent witnessed the passing of the bag from his vantage point in the apartment hall. The defendant sought to suppress the evidence obtained by the officer's entrance into the building and consequent observations.

The court suppressed the evidence. According to the Sixth Circuit, the determination in *Katz* that the trespass doctrine was no longer controlling was intended to expand the protection afforded by the fourth amendment: "*Katz*, considered with the case law before it, should be read as holding that trespassing is one form of intrusion by the Government that may violate a person's reasonable expectation of privacy."¹⁰¹ Quoting from a Fifth Circuit decision,¹⁰² the court explained that property concepts were helpful to an investigation of one's reasonable expectation of privacy because they assisted in establishing the perimeters of fourth amendment protection as they concern the home. The court stated that a tenant expects other tenants and invited guests to enter into the common areas of the building but does not expect trespassers to do the same. The trespass of the officer violated the defendant's subjective expectation of privacy and the court found that expectation reasonable.

The Sixth Circuit left open the possibility that in another situation it might not show as much deference to property concepts. The court said: "[W]e do not hold today that any evidence gained as a result of a federal agent's trespass constitutes an illegal search and seizure."¹⁰³ The court thus implicitly recognized the overbreadth of the trespass doctrine. But neither the Sixth Circuit nor Chief Judge Bazelon has resolved the problem of balancing citizens' property

100. 541 F.2d 545 (6th Cir. 1976).

101. *Id.* at 549.

102. The court quoted from *Fixel v. Wainwright*, 492 F.2d 480, 483 n.3 (5th Cir. 1974).

103. 541 F.2d at 549-50.

rights and police officers' duties to gather information by making general inquiries.¹⁰⁴

IV. CONCLUSION

The Supreme Court's decision in *Katz v. United States* was intended to expand rather than contract fourth amendment protection. The implications of the majority opinion, however, have been widely forgotten, especially its suggestion that the fourth amendment goes beyond the protection of privacy interests. Furthermore, the majority opinion intimated that no one triggering test could serve as a talismanic guide to the scope of fourth amendment protection.

Some lower federal courts have seized upon the reasonable expectation of privacy test as the sole method of determining the scope of the fourth amendment. Exclusive reliance upon the reasonable expectation of privacy test appears to be unwise, because the test has several glaring weaknesses. First, the test hinges upon the defendant's subjective expectation of privacy, an expectation that over time can be diminished by pervasive governmental intrusion and propaganda. Second, the court's determination of the reasonableness of the defendant's subjective expectation permits the judge's personal fourth amendment philosophy to play a large role in determining the scope of fourth amendment protection. This has the effect of producing irreconcilable results in different jurisdictions although the decisions are based on almost identical fact patterns.¹⁰⁵ Finally, the test fails to trigger fourth amendment protection in the situation in which a defendant's right to security, but not his right to privacy, has been violated.

On the other hand, the reasonable expectation of privacy test permits a flexibility that was unknown before the decision in *Katz*. The problem lies in establishing minimum standards of protection beyond which that flexibility can operate. This Comment has urged that the trespass doctrine should establish the minimum limits of fourth amendment protection for the citizen's home and business premises. That doctrine should be used in conjunction with the reasonable expectation of privacy test in order to trigger protection in those situations in which a warrantless intrusion occurs without a physical trespass.

The use of this dual test, however, should not be expected to serve as a "talismanic solution" to all fourth amendment problems concerning the real property owner. Situations may arise in which

104. See Section III.B.2. *supra*.

105. For example, a comparison of *United States v. Bobisink*, 415 F. Supp. 1334 (D. Mass. 1976) with *United States v. Hufford*, 539 F.2d 32 (9th Cir. 1976), *cert denied*, 97 S. Ct. 533 (1976) and *United States v. French*, 414 F. Supp. 800 (W.D. Okl. 1976) reveals disagreement over whether the placing of an electronic beeper in contraband or onto a vehicle invades a reasonable expectation of privacy.

fourth amendment protection should be extended even though protection was not triggered by either the trespass doctrine or the reasonable expectation of privacy test. But the Supreme Court's reaffirmation of the trespass doctrine in the context of the home would at least serve to guard the security of the home, an important fourth amendment interest that is not always protected by the reasonable expectation of privacy test.

The Fifth Circuit has recognized that the fourth amendment's protection goes further than privacy interests, and has accorded the sanctity of the home extra protection by refusing to apply the plain view exception when the officer has trespassed in order to gain the incriminating view. In effect it has retained the trespass doctrine. Beyond that the Fifth Circuit has also attempted to balance the interests of officers in making criminal investigations and the right of a citizen to be secure in his home by carving out a general inquiry exception to the trespass doctrine. When the Supreme Court finally decides the relationship between a trespass and fourth amendment protection after *Katz*, the Fifth Circuit's sound approach should be given great deference.

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